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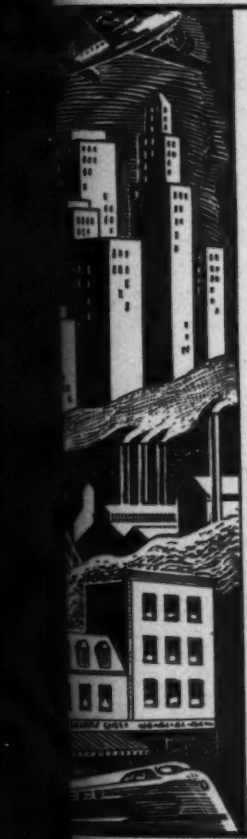

The Pennsylvania Supreme Court has held a domestic corporation to be without authority to compel holders of preferred stock, on which there were accrued, cumulative, undeclared and unpaid dividends, to accept common stock in exchange for their holdings and the right to dividends, under a plan of recapitalization, to which they dissented . . . .

Page 129

•

The New York Supreme Court has ruled that the creation of a new second preferred stock which was entitled to payment, upon dissolution, after existing preferred but before common stock, did not give rise to a right of appraisal . . . . . Page 127

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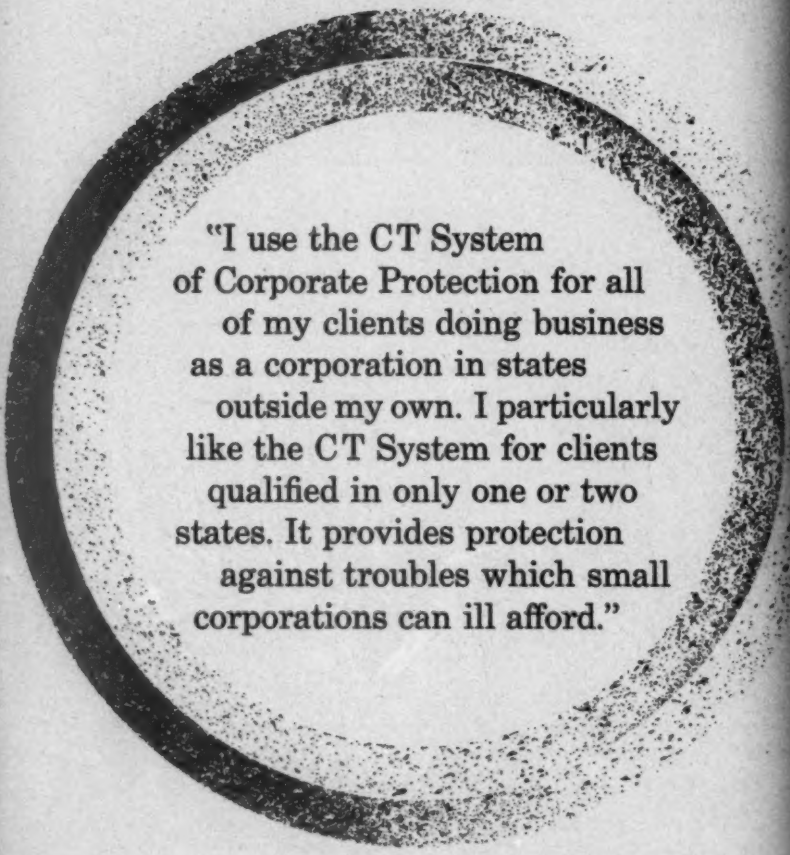
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AUGUST—SEPTEMBER 1952

Contents

ABSOLUTE
IMPARTIALITY
AND
FASTER
SERVICE
ARE
GUARANTEED
WHEN
YOU
USE
CT INSPECTORS OF ELECTION
FOR
THE
EXAMINATION
AND
TABULATION
OF PROXIES

what constitutes doing business

Maintenance of Bank Accounts

A QUESTION frequently raised is whether the mere maintenance of a bank account in a state, and nothing more, by an unlicensed foreign corporation should subject it either to the necessity of obtaining authority to do business there or to the payment of franchise taxes.

Necessity of Qualification—There appear to be no decisions involving only this limited activity within a given state, indicating whether or not qualification as a foreign corporation is required. An answer to the question may, however, be found in decisions in which several activities within a state, of which the maintenance of a bank account was one, were held not to constitute "doing business" from the standpoint of the necessity of obtaining authority from the state. (*Badische Lederwerke v. Capitelli*, 92 Misc. 260, 155 N. Y. S. 651; *Fruit Dispatch Co. v. Wood et al.*, 42 Okla. 79, 140 Pac. 1128.

Maryland and Wisconsin, in 1951, specified by statute that "maintaining bank accounts" is an activity which, if carried on by a foreign corporation would not necessitate its qualification. (Laws of 1951; Maryland, Chapter 135, Section 84; Wisconsin, Senate Bill No. 763, enacting Section 180.801.)

Oklahoma provided in 1951 that maintaining bank accounts in connection with the collection of real estate mortgage loans, "is defined as an activity which shall not be considered to be transacting or engaging in business in this state" by a foreign corporation engaged in investing in loans secured by real estate. (Session Laws, 1947, Chapter A, Title 18, Section 199(f), as added by laws of 1951, H. B. 427.)

Franchise Tax Liability—As to the liability of an unlicensed foreign corporation to the payment of a franchise tax where a bank account, and nothing else, is maintained within a state, here, too, there are no decisions limited to a consideration of this point only. There are, however, decisions in which the maintenance of a bank account was one of several activities which, taken together, were held not to constitute the doing of business so as to give rise to such liability, thus indicating that the mere keeping of the account would not, of itself, constitute "doing business" for this purpose. (*People ex rel. Lembeck & Betz Eagle Brewing Co. v. Roberts*, 47 N. Y. S. 949; *People ex rel. Washington Mills v. Roberts*, 40 N. Y. S. 417, affirmed, without opinion, 151 N. Y. 619, 45 N. E. 1134; *People ex rel. The Manila Electric Railroad & Lighting Corp. v. Knapp et al.*, 229 N. Y. 502; *People ex rel. Southern Cotton Oil Co. v. Roberts*, 48 N. Y. S. 1028.)

The rule in these cases has been implemented by statute to indicate that "the maintenance of cash balances with banks or trust companies" in New York is not to be deemed doing business for the purpose of the franchise tax on business corporations, measured by net income. (Tax Law, Article 9-A, Section 209(2).)

domestic corporations

DELAWARE

Article of charter permitting committee of interested directors for quorum purposes in order to take action prerequisite to submission of a matter for stockholder approval, ruled lawful.

Plaintiffs sought a preliminary injunction restraining the consummation of an agreement of merger between the defendant Delaware corporations. They asserted that the merger plan was not approved by a quorum of disinterested directors, and that the terms of the agreement were both fraudulent and unfair to the so-called minority stockholders of the corporation to be merged. Much of the opinion of the Court of Chancery is given over to a consideration of the terms of the agreement as related to fraud and unfairness, the court concluding that there was no inference of fraud or bad faith warranted from the case presented, and also that, under the showing made by the defendants the plan of merger was legally fair to plaintiffs and other minority stockholders of the merged company.

After stating details regarding the merger, which included facts indicating that the surviving corporation owned 83% of the stock of the merged corporation and that the stockholders of both companies had overwhelmingly approved the merger, the court stated the following question: "Is the Delaware common law rule which precludes the counting of interested directors for quorum purposes of such a nature that the stockholders may not contract to the contrary at least in situations where the action taken must be submitted for stockholder approval?" The court found a remarkable lack of authority on this problem, and no Delaware cases on the point. Construing an article of the merged company's certificate of incorporation which authorized the counting of interested directors for quorum purposes, the court concluded that, at least to the extent that the article permitted the counting of interested directors for quorum purposes in order to take action prerequisite to the submission of a matter for stockholder approval, it was lawful. The article was regarded as not violating Section 5, paragraph 8 of the General Corporation Law.

Sterling et al. v. Mayflower Hotel Corporation and Hilton Hotels Corporation, Court of Chancery, New Castle County, June 17, 1952. S. Samuel Arsht and George T. Coulson of Morris, Steel, Nichols & Arsht, and Stephen S. Bernstein of McLaughlin & Stern for plaintiffs. Aaron Finger of Richards, Layton & Finger, and William J. Friedman, for defendant Mayflower Hotel Corporation. William S. Potter of Berl, Potter & Anderson, and Claude A. Roth, for defendant Hilton Hotels Corporation. Commerce Clearing House Court Decisions Requisition No. 477111.

In suit seeking to have voting trust set aside, State Supreme Court affirms order denying motion of non-resident defendant voting trustees to vacate order for service upon them by publication.

Plaintiff below, a resident of Connecticut, and one of the defendants, a resident of Ohio, each owning one-half of the outstanding common stock of a Delaware company, had executed an instrument purporting to be a voting trust agreement, under which plaintiff, this defendant and one Charles W. Steadman, like that defendant a resident of Ohio, were designated as voting trustees. In a companion action, *Smith v. Biggs Boiler Works Co.*, 82 A. 2d 372, (The Corporation Journal, October, 1951, page 5), the Court of Chancery had found the agreement invalid in so far as it applied to a period of time limited by the nature of that proceeding. In this action, the direct relief sought was to have the agreement permanently set aside. "The defendants being outside the court's jurisdiction, an order was entered in the court below on the 7th day of May, 1951, requiring the defendants to appear by the 31st day of May, 1951, and also requiring that the order for appearance be duly published in conformity with the rules of court and the provisions of paragraph 4374, R. C. 1935, which apply in cases of substituted service. Having obtained permission to appear specially, the defendants thereupon came into court and moved to vacate the said order for substituted service. Acting Vice-Chancellor Layton denied the motion, and from this order of denial the moving defendants have appealed."

The Supreme Court of Delaware, after a consideration of pertinent statutes and decisions, including the Uniform Stock Transfer Act, which was in force during the time to which the suit related, has affirmed the decree of the Court of Chancery. The latter court was regarded as having jurisdiction over the suit even though the certificates of stock were not before it, since the situs of the stock is the domicile of the corporation.

Krizanek et al. v. Smith, 87 A. 2d 871. William E. Taylor, Jr., of Wilmington, for defendants-below, appellants. David Snellenberg II, and John Van Brunt, Jr., of Killoran & Van Brunt of Wilmington, for plaintiff-below appellee.

KENTUCKY

Dividends of consolidated corporation ruled payable out of surplus created at time of consolidation, to extent earnings were insufficient, where surplus was not needed in the conduct of the business.

A Kentucky corporation and its board of directors sought a declaration as to the right of the company to pay dividends out of a surplus created when the company was organized as the result of a consolidation of two corporations. It was alleged and not denied that the portion of the surplus proposed to be distributed in dividends was not needed in the conduct of the company's business. The preferred shareholders contended dividends could be paid to

the common shareholders only to the extent that the surplus exceeded the total par value of all the preferred stock. The common shareholders contended that any payment of dividends out of surplus were required to be made on an equitable basis, in proportion to the respective holdings of common and preferred stock, and that if any dividend was paid out of surplus to the preferred shareholders, a dividend was also required to be paid to the common shareholders. Between the time of organization of the company and the time of bringing the action, the company realized less earnings than the amount accruing for dividends on the preferred stock. Thus, the basis for an actual controversy existed as to the right to pay, out of the surplus, the amount by which the earnings were insufficient to meet the accrued dividends. The rights of creditors were not involved.

The Court of Appeals of Kentucky affirmed a Circuit Court judgment upholding the payment of (1) dividends accrued on the preferred stock out of the surplus to the extent the earnings of the company since its organization were insufficient for the purpose; (2) future dividends accruing on the preferred stock out of the surplus to the extent that the surplus would not be needed in the conduct of the company's business and to the extent that the earnings of the company were insufficient for the purpose—without paying any dividend on the common stock; and (3) future dividends on the common stock out of the surplus to the extent that the surplus was not needed in the conduct of the company's business and to the extent that the earnings of the company would be insufficient for the purpose, with the proviso, however, "that such dividends on the common stock may not be paid out of the surplus unless all dividends accumulated on the preferred stock to the most recent quarterly dividend date have been paid, or declared and the payment adequately provided for; however, when the dividends on the preferred stock have been so paid or provided for, dividends on the common stock may be paid out of the surplus without regard to the amount paid on the preferred stock."

The Court of Appeals of Kentucky observed: "If we do not look behind the organization of the new corporation, but consider only what happened at the time of organization, the surplus would fall in the class of a paid-in surplus resulting from the receipt of assets, upon issuance of the stock of the corporation, in excess of the par value of the stock. There is ample authority for the proposition that premiums realized from the sale of stock may be regarded as profits out of which dividends may be paid." The court also said: "The articles place no restriction on the payment of dividends on the common stock, other than that the dividends on the preferred must first be provided for. So there is no contractual inhibition to the treatment of the surplus as a simple earned surplus for the purpose of dividend payments." The court emphasized that surplus available for dividends "must be a bona fide surplus based on real values."

Graham et al. v. Louisville Transit Co. et al., 243 S. W. 2d. 1019. "Tilford, Wetherby, Dobbins & Boone and Woodward, Hobson & Fulton of Louisville, for appellants. Bullitt, Dawson & Tarrant of Louisville, for appellees.

NEW JERSEY

Dissolved corporation ruled to have no right to renew lease which expired after date of dissolution.

Defendant New Jersey corporation was dissolved by action of its stockholders and a certificate of dissolution was filed in the Secretary of State's office on July 27, 1951. At that time, defendant was a tenant of premises owned by the plaintiff under a lease which was to expire on August 31, 1951, containing an option to renew. In view of the dissolution, plaintiff brought this action, in the Law Division of the Superior Court of New Jersey, to recover possession of the premises.

The court granted plaintiff's motion to strike the answer of defendant and for summary judgment for possession. It noted that upon dissolution, under R. S. 14:13-4, N. J. S. A., a corporation is continued as a body corporate to prosecute and defend suits and to enable it to settle and close its affairs to dispose of and convey its property and divide its capital, but not for the purpose of continuing the business for which the company was established. The court remarked: "No reason is suggested why the defendant wished to renew, nor can this court come to any other conclusion than that the purpose of exercising the option was to continue the business and thereby commit 'a fraud upon the statute.'"

K. & J. Markets, Inc. v. Martin Packing Corp., 86 A. 2d 715. Kapp Brothers (Herman W. Kapp, appearing) of Newark, attorneys for plaintiff. Sidney Krieger of Newark, attorney for defendant.

NEW YORK

Creation of new second preferred stock which was entitled to payment, upon dissolution, after existing preferred but before common stock, ruled not to give rise to right of appraisal.

Plaintiff corporation sought to obtain a declaratory judgment to the effect that the defendant common stockholders had no right to an appraisal and payment for their stock under a proposed plan of recapitalization of the plaintiff. Upon the adoption of a proposed plan of reorganization, whereby a new class of preferred stock was created and whereby the common stock was increased and a new 6% second preferred stock was created, which, upon dissolution, was entitled to payment after the existing 7% preferred, but before the common stock, defendants objected and demanded an appraisal and payment of their stock as provided by Section 38 of the New York Stock Corporation Law, basing their claim on the issue of this proposed new 6% stock. The counsel of the corporation advised that an amended certificate of incorporation should not be filed until the question was determined as to whether such proposed amendment would give the defendants the right of appraisal because such, if it existed, would defeat the very purpose of the proposed increase of capitalization.

The Supreme Court, Monroe County, observed that in view of the particular circumstances, the plaintiff could not be afforded a full and adequate remedy

in an appraisal proceeding, and the determination of the disputed question at issue in the pending action would serve a practical and useful purpose in determining the rights of the parties which would permit the plaintiff corporation to chart its future course with a knowledge of its rights and liabilities. For these reasons the court in the exercise of its discretion held that this was a proper case to invoke the remedy of a declaratory judgment. The court remarked:

"No case has been called to the attention of the court involving a situation such as is here presented where a new second preferred stock has been authorized which in the event of dissolution, will be entitled to payment after the existing preferred but before the common. However, the result to the common stockholders here is exactly the same as though the proposed new issue had been a first preferred instead of a second preferred. It is simply an increase in capitalization which reduces the amount available for the payment of the common stock in the event of dissolution. This result alone does not constitute a ground for appraisal."

It was therefore held that the plaintiff corporation was entitled to a judgment declaring that the defendant common shareholders had no right to an appraisal and payment for their stock under the proposed plan of recapitalization.

Standard Brewing Co., Inc. v. Peachey et al., 108 N. Y. S. 2d 583. Liebschutz, Sutton & LeLeeuw and Philip M. Liebschutz of Rochester, of counsel, for plaintiff. Hutchens & Clark, Harold G. Hutchens of Rochester, of counsel, for defendants.

Court of Appeals affirms judgment dismissing suit of minority stockholders under circumstances where corporation was revived several years after its term of existence had expired.

In *Garzo et al. v. Maid of the Mist Steamboat Co. et al.*, 278 App. Div. 508, 106 N. Y. S. 2d 4, (The Corporation Journal, December 1951—January 1952, page 45), the New York Supreme Court, Appellate Division, Fourth Department, dismissed a suit by minority stockholders under circumstances where the corporation was revived, under 1944 legislation, several years after its term of existence had expired in 1942. These stockholders had opposed the revival of the corporation and had asked for dissolution of the company or appraisal of their stock. After expiration of its term of existence in 1942, the corporation had continued to function as such until its revival in 1947. The Appellate Division had held that the 1944 statute embraced corporations whose existence had expired prior to the passage of that act; that there was no implied statutory right of the minority to have their stock appraised under the circumstances; that the legislature did not exceed its powers when it enacted Section 49 of the General Corporation Law in 1944 and made it applicable to a corporation whose term of existence had expired; and that the plaintiffs had not established facts entitling them to equitable relief by having a determination that there should be an appraisal of their stock.

Upon appeal, this judgment has been affirmed by the Court of Appeals of New York.

Garzo et al. v. Maid of the Mist Steamboat Co. et al.,* 303 N. Y. 516, 104 N. E. 2d 882. Adrian Block and John L.

Beyer, Jr., of Buffalo, for appellants. Paul P. Cohen, William G. Shoemaker, Jr., Robert O. Swados of Niagara Falls and Preston L. Wright, Jr., of Buffalo, for respondents.

OHIO

Equitable relief denied in suit between two owners of a company, where its assets were lost through their failure to cooperate.

In a suit by one of two owners of a corporation against the company and the other owner for an accounting, injunction and equitable relief, the Court of Appeals of Ohio, Cuyahoga County, concluded that no relief would be granted under circumstances where the corporation was found to have lost its substantial holdings because of the inability or unwillingness of these owners, as officers, to work in harmony for the best interests of the defendant corporation. Having, by their conduct, permitted all the assets to be lost, the court determined that it would leave them where they had placed themselves. A counter-claim and cross-petition of the corporation was, therefore, also denied.

Springborn v. Anita Land Co., et al., 101 N. E. 2d 238. Krueger, Gorman & Davis of Cleveland, for plaintiff-appellee. Thompson, Hine & Flory of Cleveland, for defendants-appellants.

PENNSYLVANIA

Corporation held to be without authority to compel holders of preferred stock, on which there were accrued, cumulative, undeclared and unpaid dividends, to accept common stock in exchange for their holdings and the right to dividends, under a plan of recapitalization, to which they dissented.

"The question here presented," said the Supreme Court of Pennsylvania, "is whether a dissenting owner of shares of preferred stock of a business corporation can be compelled, under a proposed scheme of recapitalization, to accept common stock in exchange for his holdings, with loss of his right to the then accrued, cumulative, undeclared and unpaid dividends."

The two preferred shareholders who instituted this suit against their corporation for an injunction to restrain it from proceeding with a recapitalization plan, approved by 60% of preferred and common stockholders, held stock on which there were accrued, undeclared and unpaid dividends on each of the shares amounting to $157.50. The plan involved an increase in the authorized common stock without nominal or par value from 3,750 to 75,000 shares, and the conversion of each of the outstanding shares of the preferred, together with the accrued dividends thereon, into 10 shares of the increased common, the preferred shareholders to surrender and exchange their shares accordingly. The court noted that the company was incorporated in 1924 under the General Corporation Act of April 29, 1874. It observed that "the relation between a corporation and a preferred shareholder is one of contract, especially as to the

BRIDGES

HOMES

HOSPITALS

ROADS

AIRFIELDS

RURAL ELECTRIFICATION LINES

FACTORIES

CHURCHES

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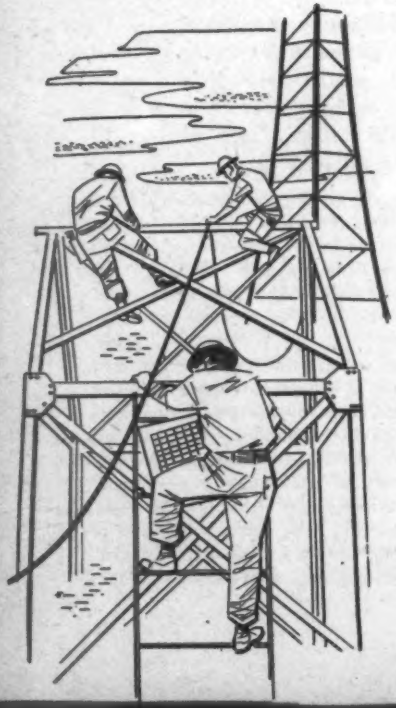
DREDGING . . . . . .



Contracts for all types of construction work are being let. If it is an out-of-state contract, careful consideration must be given to the need and costs of qualifying as a foreign corporation. Helpful information on the requirements of any state or Canadian province can be obtained *by counsel* at any C T office, without charge.

preferential rights secured by the terms of the issue," and that, in the present instance, "the contract was embodied in the by-laws of the company, the resolutions under which the stock was issued, and the provisions set forth in the stock certificates themselves; also entering into the contract were the statutes then in existence." Continuing, the court remarked: "Since the contract thus established would be materially changed by the proposed plan of recapitalization, the obvious question arises as to the right or authority of the corporation to effect such change against the opposition of dissenting stockholders."

After an examination of the by-laws, the governing statutes and pertinent decisions, the court concluded that "neither the amendment clause of the by-laws, nor the Act of May 21, 1923, P. L. 288, nor the Business Corporation Law of May 5, 1933, P. L. 364, supplies any authority to defendant to compel plaintiffs to exchange their preferred for common stock under the proposed plan of recapitalization, involving, as it does, the cancellation of the cumulative dividends accrued on their stock."

Schaad et al. v. Hotel Easton Co., 87 A. 2d 227. Clyde W. Teel, Teel & Danser of Easton, for appellant. Charles P. Maxwell of Easton, for appellee.

foreign corporations

MISSISSIPPI

Foreign real estate brokerage corporation, negotiating sales of Mississippi real estate in Louisiana, regarded as not doing business in state so as to be required to be qualified.

A question involved in a recent decision of the Supreme Court of Mississippi concerned whether an incorporated Louisiana real estate brokerage agency, with its principal place of business in that state, was doing business in Mississippi so as to be required to be qualified as a foreign corporation in order to be in a position to sue in the Mississippi courts to recover under the terms of a brokerage contract involving Mississippi property which had been negotiated in Louisiana.

The court outlined the company's activities with regard to Mississippi as follows: "The company usually acts to bring out of state buyers and sellers together. Less than one-half of one percent of the company's total sales involve Mississippi property. It does not have a bank account in this state, and has no agents here. Representatives of the company do not make visits to this state for the purpose of selling Mississippi lands listed with it. None of its negotiations for sales of such land

are conducted in Mississippi, and the sale or lease contracts are executed in New Orleans. It sends no agents to Mississippi, other than to take photographs and to appraise. Its primary function is bringing buyer and seller together by correspondence or at its office in New Orleans. These facts are illustrated by the dealings involved in the present case. The contract in question consists of two letters, one executed by both parties in New Orleans, and the other consummated through the United States mail. Negotiations between the parties, and with the lessee and the lender, were conducted either in New Orleans or through the mails."

The court concluded that the company was not doing business in Mississippi so as to require it to qualify in order to sue in the state courts. It regarded the interstate character of the company's operations as primary and substantial, and the minor acts which occurred in Mississippi in isolated instances in themselves as part of interstate commercial activities and as not constituting doing business in the state.

Shemper v. Latter & Blum, Inc., 58 So. 2d 359. Rushing & Guice, of Biloxi, for appellant. O. K. Wiesenburg of Pasagoula, for appellee.

NEW YORK

Unlicensed air transportation company, with local ticket agency and local representative having limited authority, promoting flights between foreign countries, ruled not doing business for purpose of service of process upon it.

Defendant was a foreign corporation organized under laws of the Colony of Malta, engaged in air transportation principally in the area of the Mediterranean Sea and in operating chartered flights in and out of Bermuda. It authorized a New York company to act as its agent, maintain an office and use its name for the sale of tickets, but did not undertake to pay for those services or defray any expenses, and did not reserve any right of supervision or control. Service of process was made upon an individual whom defendant had appointed, who had no authority to enter into contracts or to exercise judgment and discretion such as would be necessary to constitute him a managing agent. His authority to act was terminated prior to the time summons and complaint were served on him.

The New York Supreme Court, Monroe County, regarded the activities of the defendant with respect to New York as such as would not constitute the doing of business so as to make it subject to the jurisdiction of the courts. In granting a motion to vacate and set aside the service of summons, the court also ruled that the person served was not shown to be a managing agent of the defendant.

Great Lakes Press Corp. v. Air Malta, Limited, 111 N. Y. S. 2d 802. David Schoenberg of Rochester, Frank G. Wittenberg of New York City, of counsel, for plaintiff. Naylon, Foster, Shepard & Aronson, George Foster, Jr., of counsel, of New York City, for defendant.

Service of process set aside where made on sales manager merely soliciting orders in state.

Plaintiff, a resident of Connecticut, who had purchased a product manufactured by defendant through an independent dealer and distributor located in Connecticut, instituted suit in the United States District Court, Eastern District, New York, for injuries alleged to have been sustained as a result of the use of the product. Service, which defendant sought to have vacated, was made upon a sales manager of defendant in charge of a territory which embraced nine states, including New York and Connecticut. The authority of this agent was limited to the solicitation of orders, which were accepted in Minnesota, from which state shipments were made solely to dealers, distributors and jobbers. No office was maintained in New York. All collections were made from Minnesota and the agent had no authority to adjust any claims or negotiate contracts.

The court granted defendant's motion to vacate the service and dismiss the complaint, concluding that it could not be regarded as "doing business" so as to be subject to the jurisdiction.

Toothill v. Raymond Laboratories, Inc., 100 F. Supp. 350. David Tepp of White Plains, for plaintiff. Mendes & Mount (Brendan C. Kelly, of counsel) of New York City, for defendant.

PENNSYLVANIA

Corporation maintaining showroom, where it entered into contract for sale, delivery and collection of payment of article sold, ruled subject to service of process.

Defendant New Jersey corporation, having its principal office in New Jersey, sought to have a suit against it in a Pennsylvania county court dismissed for want of jurisdiction, on the ground that, in the county, it had no office or place of business where business was regularly conducted. The evidence showed, however, that special meetings of the plaintiff and an officer of the defendant took place in a showroom of the defendant in a building in Pittsburgh, the door of which bore only the name of the defendant and that the officer of the defendant, in writing the plaintiff had referred to its "Pittsburgh showroom, Room 1113 Clark Building." The contract was made in that room, the purchase price in two installments was paid there and the article sold was delivered in that room.

The Court of Common Pleas, Allegheny County, while regarding the case as a close one, ruled against the contention of the defendant and ordered the case to proceed to trial.

Esman v. Koff Furs, Inc.,* 100 Pittsburgh L. J. 133. Abraham Pervin, for plaintiff. Markel & Markel, for defendant. Commerce Clearing House Court Decisions Requisition No. 473261.

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* The full text of this opinion is printed in the **State Tax Reporter, Pennsylvania, page 10,879.**

taxation

CALIFORNIA

Where no arrangements are made regarding the sales tax, buyer is not to be burdened by the tax by implication.

The question presented was whether a buyer is liable to a seller for the amount of the sales tax, although no provisions for the tax were made in the contract of sale. The California District Court of Appeal, Third District, after giving consideration to the seller's contention that liability existed under Sections 6011, 6052 and 6053 of the Sales and Use Tax Law, observed: "We do not agree with appellant's contentions. It is well established—indeed, appellant concedes—that the tax is imposed on the retailer and not the consumer. It is true that under Section 6052 the retailer is permitted 'to pass on' the tax to the consumer, but this section does not charge the retailer with a mandatory duty to collect the amount of the tax. The rights of the retailer under this section are optional and may be waived."

As to the retailer's right to reimbursement, the court observed: "The buyer-consumer has no obligation in reference to the tax. As to him the 'selling price' is the amount he must pay to obtain the goods whether or not the sales tax forms a part of the selling price. If the retailer is to 'pass on' the tax to the buyer-consumer the tax must form a part of the total price which the buyer pays or agrees to pay. When, therefore, the parties have contracted as to the price, the buyer is bound to pay that price and no more. And even though the contract is silent as to whether that price includes or excludes a sales tax, the law will not by implication add to the burden of the buyer the amount of the tax as to which, the contract being silent, he is not bound."

*Pacific Coast Engineering Co. v. State of California,** 244 P. 2d 21. David D. Oliphant, Jr., of Oakland, for appellant. James E. Sabine and Ernest P. Goodman, Deputy Attorneys General, for respondent. Commerce Clearing House Court Decisions Requisition No. 476044.

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* The full text of this opinion is printed in the **State Tax Reporter, California,** page 12,449.

MISSISSIPPI

State held to have the right to impose sales tax on illegal transactions.

An appeal to the Supreme Court of Mississippi presented the question whether the appellant, engaged in business as defined by the Sales Tax Law, was liable for 2% retail sales tax on illegal sales of intoxicating liquor. In addition to his legal sales, for which he had reported and paid the 2% tax, he was "also engaged in the illegal sales of intoxicating liquor," for which

sales were not reported and on which no tax was paid. Appellant sought to enjoin the collection of the tax levied by the State Tax Commission on such sales, assessed according to the best information available to it.

In affirming a decree adverse to appellant, the court observed: "Our sales tax law makes no distinction between legal transactions and those that are illegal. A merchant may open his store and sell his goods on Sunday in violation of law buit it could hardly be successfully contended that such sales are not subject to taxation as are sales made on all other days of the week. The State has the right to exact a tax on illegal transactions."

Portera v. McLemore et al., Supreme Court of Mississippi, March 17, 1952. Commerce Clearing House Court Decisions Requisition No. 471069.

TEXAS

Foreign corporation, having paid maximum fee during ten-year period, ruled required to pay similar fee upon renewal of permit.

Appellant Delaware corporation sued the Secertary of State and other State officials, in their official capacities, to recover $2,500, which it had paid under protest, this amount having been claimed by the Secretary of State to be due as a fee for a renewal of appellant's permit to do business in Texas. A nonjury trial, upon stipulated facts, had resulted in a judgment that appellant take nothing by its suit.

The company had been issued a permit to do business in Texas on June 2, 1941. Subsequently, it had filed charter amendments and others instruments with the Secretary of State and paid filing fees totaling $2,500. On May 24, 1951, the corporation tendered to the Secretary of State its application for a renewal of its permit to do business in Texas. That official refused to file the application until a filing fee of $2,500 was paid. Appellant paid this fee, accompanied by a written protest, in which it was stressed that Article 3914, R. C. S., provides that "the maximum filing fees to be paid by any domestic or foreign corporation shall be $2,500," and that, having paid the maximum filing fees required by law, it was entitled to have its application documents filed without the payment of additional filing fees.

The Court of Civil Appeals, Austin, affirmed the judgment of the trial court, denying a recovery, indicating that the payment of the maximum fee during one ten-year period for which a permit was granted did not preclude the payment of a like fee for renewal of the permit for the succeeding ten-year period.

The Chicago Corporation v. Shepperd et al.,* 248 S. W. 2d 261. Small, Small & Craig, by C. C. Small, Jr., of Austin, for appellant. Price Daniel, Attorney General and William H. Holloway, Assistant Attorney General, for appellees. Commerce Clearing House Court Decisions Requisition No. 473437.

* The full text of this opinion is printed in the **State Tax Reporter, Texas**, page 10,187.

state legislation

Arizona — Chapter 136 changes the due date of the corporation income tax return to April 15 or 105 days after the last day of a corporation's fiscal year. The tax may still be paid in two equal installments, the first to be paid at the time prescribed for making the return and the second 75 days thereafter.

Kentucky — House Bill 276 provides that the corporate income tax may be paid in three installments only if the entire amount of the tax is $30 or more.

Massachusetts — By the enactment of Chapter 314, the fees for the filing of certificates of domestic corporations, other than articles of organization and certificates of increase or change of capital stock, have been changed from $10 to $15. By the enactment of Chapter 315, the filing fees for certificates and statements of foreign corporations, except the fee for filing copies of the charter and by-laws and the certificate required upon qualification have been increased from $10 to $15.

Michigan — Public Act No. 183 increases the rate of the franchise tax on corporations from 3½ mills to 4 mills on each dollar of paid-up capital and surplus allocated to the state and makes cooperative associations subject to the tax.

Public Act No. 181 increases the rate on income producing intangible personal property from 3% to 3½% of the income.

Mississippi — House Bill 38 re-enacted the income tax requirements, effecting an increase in the rates applicable to the taxable income of corporations for the year 1952 and thereafter.

House Bill 548, re-enacting the use or compensating tax requirements, brought about a change in the due date of the monthly returns from the 15th to the 20th of each month.

New York — Chapter 791 adds a new section to the Civil Practice Act to provide that any records kept in the regular course of business which have been photographically reproduced may be admitted in evidence.

Rhode Island — House Bill 684 continues the rate of the Business Corporation Tax at 5% for another year.

appealed to the supreme court

*The following cases previously digested in The Corporation Journal have been appealed to The Supreme Court of the United States.**

OCTOBER 1951 TERM

ILLINOIS. Docket No. 644. *City of Chicago v. The Willett Co.*, 406 Ill. 286, 94 N. E. 2d 195. (The Corporation Journal, June, 1951, page 353.) Municipal license tax on carters transporting property in intracity, intrastate and interstate commerce. **Petition for writ of certiorari filed, January 12, 1951. April 23, 1951: "Per curiam:** The petition for writ of certiorari is granted. The judgment is vacated and the case is remanded to the Supreme Court of Illinois, for clarification by that court to show, in light of *Minnesota v. National Tea Co.*, 309 U. S. 551; *State Tax Comm. v. Van Cott*, 306 U. S. 511, whether the judgment herein rests on an adequate and independent state ground or whether decision of a federal question was necessary to the judgment rendered." (71 S. Ct. 734.) **Petition for rehearing denied, 71 S. Ct. 853.** (Upon remand for clarification, the Illinois Supreme Court stated that its decision in this case was based upon the uncontested evidence that the plaintiff carrier's interstate, intrastate and intercity business is inseparable. For this reason, the ordinance, though valid, cannot be applied to the carrier involved. *City of Chicago v. The Willett Co.*, 101 N. E. 2d 205.) **Petition for certiorari again filed, March 12, 1952. May 5, 1952:** "The motion to use the certified record in No. 493, October Term, 1950, is granted. Petition for writ of certiorari to the Supreme Court of Illinois granted and case transferred to the summary docket." (72 S. Ct. 1033.)

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* Data compiled from **CCH U. S. Supreme Court Bulletin, 1951-1952.**

regulations and rulings

Kentucky— Bank deposits in Kentucky owned by non-residents are not taxable in Kentucky unless the money represented by the deposit has a business situs there, arising from the use of the money in a permanent business operation in Kentucky. Where the deposit in the Kentucky bank is temporary and made only to be checked out to the non-resident corporation at its home office, and for no other purpose, and the non-resident corporation has a depository at its domicile where all checks issued for commodities or service in its business are issued against deposits that are in the institution at its domicile, and no checks are issued by the firm against the deposit in the Kentucky bank for the operation of its business in Kentucky, the deposit in the latter bank has not acquired a taxable situs in Kentucky and is exempt from taxation. (Opinion of the Attorney General, State Tax Reporter, Kentucky, ¶ 20-112.)

Minnesota— Merchandise owned by a merchant or manufacturer must be assessed in the county where the main office is located, despite the fact that the merchandise is stored in other counties of the state. (Opinion of the Attorney General, State Tax Reporter, Minnesota, ¶ 24-023.)

New York— A corporation may be organized under the Membership Corporation Law for charitable purposes with the power to operate a so-called thrift shop for sale of articles of personal property donated for the benefit of charities and eleemosynary corporations. The use of a corporate name, although somewhat misdescriptive of a membership corporation is not prohibited by statute. (Opinion of the Attorney General.)

Ohio— Machinery and equipment in the process of erection and construction for use in a manufacturing plant still under construction on the tax listing day, January 1, are not subject to property taxes for that year. The property is taxable when it is a part of a going business and not before it becomes useable. (Ruling of Ohio Board of Tax Appeals, State Tax Reporter, Ohio, ¶ 200-098.)

North Carolina— A manufacturer of articles of personal property which are normally and customarily sold through the regular channels of commerce, does not cease to be a manufacturer and become a contractor-consumer of property merely because that property is to be used in manufacturing a custom-built article of the same type that the manufacturer normally sells at retail. Sales to such manufacturer are subject to tax at the wholesale rate only. (Opinion of the Attorney General, State Tax Reporter, North Carolina, ¶ 60-073.)

A foreign corporation which maintains sales offices and a warehouse in North Carolina is subject to the intangible property tax on accounts receivable resulting from orders filled from the North Carolina warehouse, even though all control for the collection and disposition of accounts receivable is centralized in the corporation's out-of-state headquarters. (Opinion of the Attorney General, State Tax Reporter, North Carolina, ¶ 25-104.)

A cooperative foreign wine association is required to domesticate in order to have the privilege of storing wines to be offered for sale to counties where permitted. (Opinion of the Attorney General, State Tax Reporter, North Carolina, ¶ 4-002.)

some important matters

For August and September

This Calendar does not purport to be a *complete* calendar of all matters requiring attention by corporations in any given state. It is a condensed calendar of the more important requirements covered by the *State Report and Tax Bulletins* of The Corporation Trust Company. Attorneys interested in being furnished with timely and complete information regarding *all* state requirements in any one or more states, including information regarding forms, practices and rulings, may obtain details from any office of The Corporation Trust Company or C T Corporation System.

Arkansas—Anti-Trust Affidavit due on or before August 1.—Domestic and Foreign Corporations.

Annual Franchise Tax due on or before August 10.—Domestic and Foreign Corporations.

California—Franchise Tax based on net income. Second Installment due on or before September 15.—Domestic and Foreign Corporations.

Connecticut—Annual Report due on or before August 15 (if corporation was organized or qualified between July 1 and December 31 of any previous year).—Domestic and Foreign Corporations.

Quarterly Retail Sales Tax Returns and Payments due on or before July 31 and October 31.—Domestic and Foreign Corporations.

Louisiana—Franchise Tax Report and Tax due on or before October 1.—Domestic and Foreign Corporations.

Idaho—Annual Statement and Annual License Tax due between July 1 and September 1.—Domestic and Foreign Corporations.

Maine—Annual Franchise Tax due September 1; delinquent one month later. —Domestic Corporations.

Michigan—Annual Report and Franchise Tax due during July and August. —Domestic and Foreign Corporations.

Oklahoma—Annual Capital Stock Affidavit due between July 1 and August 1. —Foreign Corporations.

Annual Franchise Tax Report and Tax due on or before August 31.—Domestic and Foreign Corporations.

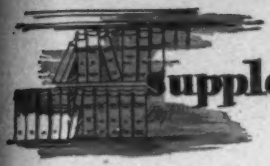
Oregon—Annual License Fee due within 30 days after July 15.—Domestic Corporations.

Annual License Fee due between July 1 and August 15.—Foreign Corporations.

Report of Abandoned Property due on or before September 1.—Domestic and Foreign Corporations.

United States—Third Installment of Income Tax due September 15.—Domestic Corporations and Foreign Corporations having offices or places of business in the United States.

Wisconsin—Second Installment of Income Tax due on or before August 1.—Domestic and Foreign Corporations.



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